

**STATE OF MICHIGAN  
IN THE SUPREME COURT**  
Appeal from the Michigan Court of Appeals  
(Saad, P.J., and Sawyer and Hoekstra, JJ.)

JULIE A. PUCCI,

Plaintiff-Appellant,

v

CHIEF JUDGE MARK W. SOMERS, In his  
individual capacity,

Defendant,

and

19TH JUDICIAL DISTRICT COURT,

Garnishee Defendant-Appellee.

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Supreme Court No. 153893  
Court of Appeals No. 325052  
Wayne County Circuit Court  
LC No. 13-014644-CZ

**PLAINTIFF-APPELLANT'S  
BRIEF ON APPEAL**

**ORAL ARGUMENT REQUESTED**

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### **STATEMENT OF JURISDICTION**

On March 17, 2016, the Michigan Court of Appeals issued its per curiam unpublished Opinion which reversed the trial court's grant of Plaintiff-Appellant's Motion for Summary Disposition.

On May 2, 2016, the Michigan Court of Appeals denied Plaintiff-Appellant's timely Motion for Reconsideration.

Plaintiff-Appellant timely filed an Application for Leave to Appeal in this Court. On April 28, 2017, this Court granted the Plaintiff-Appellant's Application. This Court has jurisdiction pursuant to MCL 600.215(3).



**STATEMENT OF QUESTIONS PRESENTED**

- I. Does the Chief Judge of a District Court possess authority under MCL 691.1408(1) and MCR 8.110(C) to adopt an employee indemnification policy on behalf of the District Court?
- II. If a Chief Judge possesses the authority, may the Chief Judge adopt a policy that indemnifies employees for liability incurred in their individual capacity?
- III. Did Chief Judge Somers's conduct terminating Plaintiff as Deputy Court Administrator occur "while in the course of employment and while acting within the scope of his or her authority?"

## STATEMENT OF FACTS

### A. The Underlying Federal Civil Rights Case.

Plaintiff-Appellant Julie Pucci, was terminated as Deputy Court Administrator of the 19th District Court by Chief Judge Defendant Mark Somers when he reorganized the court and eliminated her position. *Pucci v Nineteenth District Court*, 596 Fed App'x 460, 462 (CA 6, 2015.) Pucci sued Somers, the 19th District Court and the City of Dearborn (the court's local funding unit) in the United States District Court for the Eastern District of Michigan pursuant to 42 USC 1983. (Appx. p. 114a, Exhibit N, Third Amended Complaint.)

Among other things, Pucci claimed that Somers violated her *First Amendment* free speech rights when he eliminated her position as an act of retaliation "after she complained to a state administrative agency about Somers's use of religion from the bench." *Pucci*, 596 Fed App'x at 462. Pucci also alleged that Somers violated her *Fourteenth Amendment* due process rights when he deprived her of a pre-termination hearing and discriminated against her based on gender in violation of Michigan's Elliot Larsen Civil Rights Act. (Appx. p. 114a, Exhibit N, Third Amended Complaint.) Somers was sued in both his "individual" and "official" capacities for his violation of Pucci's constitutional rights.<sup>1</sup>

Shortly after filing, Pucci voluntarily dismissed the City of Dearborn because it had no say in the management of district court personnel. *Judicial Attorney's Association v State of Michigan*, 459 Mich 291 (1998). Responsibility for management and administration of local court personnel rested exclusively with Chief Judge Somers. *Id.* at 297-298; MCR 8.110(C)(3)(d).

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<sup>1</sup> Plaintiff also sued Somers for gender discrimination prohibited under Michigan's Elliott-Larsen Civil Rights Act, being MCL 37.2101, et seq. (Amended Complaint, Count II.) The jury returned a verdict for Somers on this claim. (Appx. p. 229a, Exhibit Q, Plaintiffs MSD Exhibit B, Jury Verdict Form.)

Before trial, on interlocutory appeal by Somers, the United States Court of Appeals for the Sixth Circuit dismissed the 19th District Court under *Eleventh Amendment* sovereign immunity. *Pucci v Nineteenth Dist Court*, 628 F3d 752 (CA 6, 2010). The Sixth Circuit, however, rejected Somers's claim of qualified immunity in his "individual capacity" and allowed Pucci to proceed against Somers in his "official capacity" for prospective injunctive relief (i.e., reinstatement.) *Id.* at 765.

The case proceeded to trial.

At trial, Somers testified that Pucci lost her job when he implemented an administrative court reorganization first conceived of by his predecessor, Chief Judge Leo Foran. 596 Fed App'x at 463-464; *Pucci v Nineteenth Dist Court*, 628 F3d 752, 757<sup>2</sup> (CA 6, Cir, 2010). The jury did not believe Somers's explanation and, on June 30, 2011, found that he violated Pucci's *First* and *Fourteenth Amendment* constitutional rights when he used his state-conferred administrative authority over court personnel to reorganize the court and eliminate her job. (Appx. p. 229a, Exhibit Q, Plaintiff's MSD, Exhibit B, Jury Verdict Form.) After post-verdict motions, the U.S. District Court awarded judgment against Somers in his "individual capacity" in the amount of \$1,173,125.30. (Appx. p. 22a, Exhibit C, Amended Judgment.) *Pucci v Somers*, 834 F Supp 2d 690 (ED Mich, 2011).

Somers appealed to the Sixth Circuit Court of Appeals and argued that, among other

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<sup>2</sup> The Sixth Circuit noted:

Meanwhile, Foran decided to reorganize the Nineteenth District Court's administrative structure. On March 30, 2005, he announced his intent to replace the retiring court administrator with Pucci and not fill the resulting absent deputy court administrator position. Foran explained, "[Pucci] was doing the job as court administrator anyway. She was accepted, highly regarded, and respected by any attorney that ever talked to me about her and highly respected and regarded in the community at large." *Id.*

*Pucci v Nineteenth Dist Court*, 628 F3d 752, 757 (CA 6, 2010).

things, the court reorganization defeated Pucci's claims. The Sixth Circuit rejected this argument and affirmed. The Sixth Circuit reasoned:

As a result, when the jury decided the retaliation claim in Pucci's favor, it must necessarily have decided that retaliating against Pucci for her complaints to the SCAO formed at least part of Somers's motive. In order to do so, the jury must have rejected the view that reorganization alone motivated the termination. The jury found that Somers's focus was not purely on the reorganization of the court, but on Pucci as an individual. Thus, even if the reorganization exception applied, he would have been unable to show that pre-termination process was unnecessary.

596 Fed App'x at 475. (Appx. p. 10a, Exhibit B.)

**B. The 19th District Court's Indemnification Policy for The *Pucci* Judgment.**

On June 13, 2011, eight days before trial, then Chief Judge Somers issued a written employee indemnification policy on behalf of the court for payment of any judgment entered against 19<sup>th</sup> District Court judges and supervisory personnel for administrative employment decisions. (Appx. p. 25a, Exhibit D, Indemnification Policy.) The Indemnification Policy provided, in pertinent part:

It is the official policy of the 19<sup>th</sup> District Court that the supervisory personnel identified herein shall be indemnified and held harmless for the costs of defending and *for any judgment entered against them* resulting from any civil action for discretionary administrative decisions made within the scope of his or her authority including decisions regarding the hiring, firing and/or discipline of its employees and the creation, reorganization and/or elimination of personnel positions as they deem appropriate to the efficient, economical and necessary functioning of the court. (Emphasis added.)

*Id.* Chief Judge Somers adopted the Indemnification Policy pursuant to MCL 691.1408(1), MCR 8.110(C) and MCL 600.8221.

On January 1, 2012, Judge Richard Wygonik was appointed by the Michigan Supreme Court to succeed Somers as 19th District Court Chief Judge. (Appx. p. 28a, Exhibit E, Wygonik Affidavit.) After judgment was entered and fixed, Chief Judge Wygonik ratified the employee Indemnification Policy and expressly promised that the 19th District Court would indemnify Somers for the *Pucci* judgment. *Id.* Chief Judge Wygonik filed a sworn Affidavit in the federal

collection proceedings, *infra*, which attested:

1. Effective January 1, 2012, the Michigan Supreme Court appointed me Chief Judge of the 19<sup>th</sup> District Court Dearborn, Michigan.
2. On June 9, 2011, the then-Chief Judge of the 19<sup>th</sup> District Court, Mark Somers, drafted and adopted an indemnity policy. (Attachment 1).
3. **Under that policy, the 19<sup>th</sup> District Court will indemnify any of its judges for settlements, judgments or mediation amounts that plaintiffs receive against a judge of the 19<sup>th</sup> District Court while the judge was executing the duties of his or her office whether judicial or administrative in nature.**
4. **As the Chief Judge of the 19<sup>th</sup> District Court, I have adopted the earlier indemnity policy and decided that the 19<sup>th</sup> District Court will indemnify Judge Mark Somers for the judgment or any settlement in the above captioned case, *Pucci v. Somers*.**

(Bold added). (*Id.*) Judge Sam Salamey who succeeded Judge Wygonik as 19<sup>th</sup> District Court Chief Judge also agreed that “if the judge violates the Constitutional Rights [of an employee] within his, in the discharge of his professional duties at the court, then I believe that the court would be responsible.” (Appx. 241a, Exhibit Q, Plaintiff’s MSD, Salamey Dep., p. 38, lines 18-22). That is the case here.

### **C. The Federal Collection Proceedings.**

On May 12, 2012, at Pucci’s request, the United States District Court issued a *Writ of Garnishment (Non-Periodic)* against the City of Dearborn, the local funding unit for the 19<sup>th</sup> District Court, to satisfy the judgment and/or to fund the Indemnification Policy. The City of Dearborn filed a *Motion to Quash* for lack of subject matter jurisdiction. (Appx. 339a, Exhibit U, Motion to Quash.)

Dearborn and Pucci filed cross-motions for summary judgment. (Appx. p. 357a, Exhibit V, Plaintiff’s Motion for Summary Judgment and Brief in Support; Appx. p. 339a, Exhibit U, City of Dearborn Motion for Summary Judgment and Brief in Support.) The 19<sup>th</sup> District Court

filed an *Amicus Brief* which acknowledged its obligation under the employee Indemnification Policy, and sought its enforcement and financing from the local funding unit to pay the judgment. (Appx. p. 137a, Exhibit O, 19<sup>th</sup> District Court *Amicus Brief*.)

The District Court granted Dearborn's motion for lack of subject matter jurisdiction, without prejudice. *Pucci v Somers*, 962 F Supp 2d 931 (ED Mich, 2013). The District Court noted that all parties agreed that the Indemnification Policy covered the judgment. *Id.* at 937. The District Court, however, declined ancillary jurisdiction because "[T]he indemnification theory is a new theory that was not part of the previous proceedings in this case." *Id.* at 938-939. The District Court ruled that "[Pucci] must seek her remedies against the state district court and the City of Dearborn under the federal judgment in state court." *Id.* at 933. She then did so.

#### **D. The State Court Garnishment Proceedings.**

On November 11, 2013, Pucci domesticated the federal judgment in Wayne County Circuit Court pursuant to MCL 691.1172 and 691.1173. (Appx. p. 31a, Exhibit F, Domesticated Judgment.) On December 4, 2013, the trial court issued a *Writ* to the 19<sup>th</sup> District Court to enforce its Indemnification Policy for the *Pucci* judgment.<sup>3</sup> (Appx. p. 35a, Exhibit G, *Writ of Garnishment (Non-Periodic)*.) The 19<sup>th</sup> District Court reversed the position it advanced in its U.S. District Court *Amicus Brief* and objected to the *Writ*.<sup>4</sup> (Appx. p. 137a, Exhibit O, *Amicus Brief*; Appx. p. 189a, Exhibit P, Garnishee Disclosure.)

After discovery closed, Pucci and the 19<sup>th</sup> District Court filed cross motions for summary

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<sup>3</sup> Pucci, as Somers's judgment creditor, may enforce this obligation. MCL 600.4011(1)(b); MCR 3.101(B)(2); MCR 3.101(G). See also, MCL 600.1405.

<sup>4</sup> The City of Dearborn was represented by The Miller Canfield Law Firm in federal collection proceedings where they opposed the 19<sup>th</sup> District Court's position that its Chief Judges had authority to indemnify Defendant Somers for the *Pucci* judgment. (Appx. p. 442a, Exhibit X, Motion for Disqualification (exhibits omitted.) The same law firm represented the 19<sup>th</sup> District Court in the state court proceedings and asserts arguments identical to those advanced by the funding unit in the U.S. District Court. (*Id.*) One wonders who is doing whose bidding.

disposition. (Appx. p. 191a, Exhibit Q, Pucci's MSD and Brief in Support; Appx. p. 267a, Exhibit R, 19th District Court MSD and Brief in Support; Appx. p. 316a, Exhibit S, Pucci Reply Brief; Appx. p. 329a, Exhibit T, 19<sup>th</sup> DC Reply Brief.) The Circuit Court found that Somers acted in the course of his employment and within the scope of his authority as Chief Judge when he terminated Pucci and violated her constitutional rights. (Appx. p. 38a, Exhibit H, Hearing Transcript of 11/26/2014, pp. 10-15). Accordingly, the Circuit Court enforced the Indemnification Policy and entered judgment against the 19<sup>th</sup> District Court for \$1,183,330.96. (Appx. p. 56a, Exhibit I, Order of 12/11/2014 Granting Plaintiff's MSD.)

#### **E. The Court of Appeals Reversal.**

The 19<sup>th</sup> District Court appealed and the Court of Appeals reversed. *Pucci v 19<sup>th</sup> Judicial Dist Court*, 2016 Mich App LEXIS 560, unpublished opinion per curiam of the Court of Appeals, issued March 17, 2016) (Docket No. 325052). (Appx. p. 1a, Exhibit A.) In its unpublished *per curiam* opinion, the Panel seemingly agreed with every legal argument asserted by Pucci and then reversed.

While we agree that a Chief Judge can adopt an indemnification policy that covers the court's employees and judges while acting in their official capacity, *we do not believe that this power extends to indemnifying judges for liability incurred in their personal capacity*. Therefore, because the judgment in this case is against the judge in his personal capacity, the indemnification policy does not apply and defendant Court is not liable.

*Id.* at \*18. (Emphasis added.) This ruling was clearly erroneous.

On April 5, 2016, Pucci filed a timely motion for reconsideration. (Appx. p. 75a, Exhibit K, Motion for Reconsideration.). On May 2, 2016, the Panel denied Plaintiff's motion. (Appx. p. 106a, Exhibit L, Order Denying Motion for Reconsideration.)

## STANDARD OF REVIEW

This Court reviews *de novo* a trial court's decision on a motion for summary disposition under MCR 2.116(C) (10). *Maiden v Rozwood*, 461 Mich 102, 118 (1999).

The interpretation and application of a statute presents a question of law that the appellate court reviews *de novo*. *Tomecek v Bavas*, 482 Mich 484, 490 (2008).

## ARGUMENT

### **A. A District Court Chief Judge Has Authority to Adopt an Employee Indemnification Policy on Behalf of the District Court Pursuant to MCL 691.1408(1) and MCR 8.110(C).**

The principal rule of statutory construction is to discern and give effect to the legislative intent by examining the most reliable evidence of intent, the statutory language. *Gardner v Dep't of Treasury*, 498 Mich 1, 5-6 (2015). When the statutory language is unambiguous, the Legislature intended the meaning clearly expressed, the statute must be enforced as written, and no further judicial construction is necessary. *Krusac v Covenant Med Ctr, Inc*, 497 Mich 251, 256 (2015). "Courts may not speculate regarding legislative intent beyond the words expressed in a statute. Hence, nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself." *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 217-218 (2011) (quotation marks and citation omitted). The wisdom of a statute is for the determination of the Legislature and the law must be enforced as written.<sup>5</sup> *Elezovic v Ford Motor Co*, 472 Mich 408, 421-422 (2005). This Court interprets court rules according to

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<sup>5</sup> The doctrine of expression *unis est exclusion alterius*, or inclusion by specific mention, excludes what is not mentioned is also a rule of statutory construction. *Hackel v Macomb County Comm'n*, 298 Mich App 311, 324 (2012) citing *Detroit City Council v Detroit Mayor*, 283 Mich App 442, 452 (2009). The doctrine is "a rule of construction that is a product of logic and common sense. The doctrine characterizes the general practice that when people say one thing they do not mean something else." *Id.*



the same rules applicable to statutory interpretation. *CAM Constr v Lake Edgewood Condominium Ass'n*, 465 Mich 549, 553 (2002).

Michigan has but “one court of justice” of which the 19<sup>th</sup> District Court is a part. Const 1963, art 6, § 1. MCL 600.8111 to 600.8163. The 19th District Court is one of approximately 100 judicial district courts throughout the State. The 19<sup>th</sup> District Court is a governmental agency and its own administrative unit under the superintending control of the Court. MCL 691.1401(a), 600.8101(1),<sup>6</sup> 600.8103(3). The Supreme Court appoints a chief judge to administrate each judicial district court for a two-year term. MCR 8.110(B).<sup>7</sup>

Pursuant to statute and MCR 8.110 (the “Chief Judge Rule”), a District Court Chief Judge is the “director of the administration of the court” with full authority and control over *all* matters of administration, including, among other things, hiring, firing and disciplining court personnel, managing finances, and initiating “policies for internal operations and its position on external matters facing the court.” MCL 600.8271<sup>8</sup>; MCR 8.110(C), (2), (c), (3), (d), (f), (i)<sup>9</sup>;

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<sup>6</sup> MCL 600.8101 provides:

- (1) A district court is established in the state. The district court is a court of record. The state is divided into judicial districts of the district court each of which is an administrative unit subject to the superintending control of the supreme court.

<sup>7</sup> Defendant Mark Somers was the 19<sup>th</sup> District Court Chief Judge from 2004-2012. He was succeeded by chief judges Richard Wygonik (2012-2013) and Sam Salamey (2013-present).

<sup>8</sup> MCL 600.8271(6)(b) provides:

The chief judge has authority to establish policies and procedures relating to work schedules, discipline, grievances, personnel records, probation, hiring and termination practices, and other personnel matters not included in subdivision (a).

<sup>9</sup> MCR 8.110(C) provides:

- (2) As the presiding officer of the court, a chief judge *shall*:

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*Judges of the 74<sup>th</sup> Judicial District v County of Bay*, 385 Mich 710, 722 (1971). MCR 8.110(C)(3)(i) further authorizes a chief judge to “perform any act or duty or enter any order necessarily incidental to carrying out the purposes of this rule.” A district court chief judge’s administrative authority is broad. *Judicial Attorney’s Association v. State of Michigan*, 459 Mich 291, 298-299 (1998)<sup>10</sup>; *Shell v Baker Furniture*, 461 Mich 502, 512-513, 515<sup>11</sup> (2000) (“We

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(c) *initiate policies concerning the court’s internal operations and its position on external matters facing the court;*

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(3) *As the director of the administration of the court, a chief judge shall have administrative superintending power and control over judges of the court and all court personnel with the authority and responsibility to:*

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(d) *supervise the performance of all court personnel, with authority to hire, discipline, or discharge such personnel, with the exception of a judge’s secretary and law clerk, if any;*

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(f) *supervise court finances, including financial planning, the preparation and presentation of budgets, and financial reporting;*

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(i) *perform any act or duty or enter any order necessarily incidental to carrying out the purposes of this rule.*

(Emphasis added.)

<sup>10</sup> In *Judicial Attorney’s Association v State of Michigan*, 459 Mich 291, 298-299 (1998), this Court articulated the broad responsibilities and powers of trial court chief judges:

*There is no public environment in the state of Michigan more complex than the trial court component of the state’s “one court of justice.” Under art 6, § 4 of the state constitution, the Michigan Supreme Court has general supervisory control of the courts and is constitutionally responsible for the efficient and effective operation of all courts within the state court system, but the day-to-day operation of the state’s trial courts is in the hands of the chief judges of each court. The chief judges in turn are accountable to the Supreme Court and to the public for the operation of their courts, and are dependent on over 150 separate local governmental units for the bulk of the operational funding for their courts. Const 1963, art 6, §§ 1, 4. MCR 8.110. Grand Traverse Co v Michigan, 450 Mich. 457, 475; 538 N.W.2d 1 (1995). As a further complication, the jurisdiction of some courts is spread across several counties or municipalities, which must share funding responsibilities. Despite the complications of the trial court environment, the case law, taken as a whole, has come to strongly affirm that the fundamental and ultimate responsibility for all aspects of court administration,*

instead have invested chief judges with the authority to take measures not *prohibited* by the letter or spirit of the court rules.”)

MCL 691.1408, of the Government Tort Liability Act (“GTLA”), authorizes a governmental agency to indemnify an employee who incurs personal liability in the discharge of their official duties. The statute reads in pertinent part:

(1) Whenever a claim is made or a civil action is commenced against an officer, employee, or volunteer of a governmental agency for injuries to persons or property caused by negligence of the officer, employee, or volunteer while in the course of employment with or actions on behalf of the governmental agency and while acting within the scope of his or her authority, the governmental agency may pay for, engage, or furnish the services of an attorney to advise the officer, employee, or volunteer as to the claim and to appear for and represent the officer, employee, or volunteer in the action. The governmental agency may compromise, settle, and pay the claim before or after the commencement of a civil action. *Whenever a judgment for damages is awarded against an officer, employee, or volunteer of a governmental agency as a result of a civil action for personal injuries or property damage caused by the officer, employee, or volunteer while in the course of employment and while acting within the scope of his or her authority, the governmental agency may indemnify the officer, employee, or volunteer or pay, settle, or compromise the judgment.*” (Emphasis added.)

MCL 691.1408(1) (Italics added.) This statute is unambiguous. It allows a governmental agency

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*including operations and personnel matters within the trial courts, resides within the inherent authority of the judicial branch.* (Emphasis added).

*Id.* at 298-299.

<sup>11</sup> The Court explained:

The provisions of *MCR 8.110(C)* are set forth at length because they represent an instance in which the whole exceeds the sum of the parts. A chief judge has the specific authority and responsibility to act in accordance with each separate provision of the rule. In promulgating the rule, however, we also intended that a chief judge have the authority to employ creative and energetic means to improve the delivery of justice to the citizens who come before the court.

The opinion of the Court of Appeals reflects the assumption that a chief judge is unable to take measures not specifically authorized by the court rule. 232 Mich. App. at 475-476. We instead have invested chief judges with the authority to take measures not *prohibited* by the letter or spirit of the court rules.

*Id.* at 512-513. (Italics in original).

to voluntarily indemnify a public employee and pay a personal capacity judgment for an injury caused in the discharge of the employee's governmental duties. See, *Beaudrie v Henderson*, 465 Mich 124, 140 (2001). This is fundamental to the GTLA's statutory scheme. *Id.*

SCAO, the administrative arm of the Court<sup>12</sup>, advises Michigan chief judges to manage risk for potential liability of judges or other court employees related to their official duties. SCAO instructs:

Potential claims and liability for judges and court employees is an important consideration of the chief judge and court administrator. In anticipation of potential claims, an investigation should be conducted about obtaining attorney representation and indemnification or insurance coverage for liability protection of judges and court employees. If a claim arises, there are two important considerations: attorney representation and liability coverage by way of insurance or indemnification.<sup>13</sup>

(Appx. pp. 457a – 459a, SCAO Risk Management Policy.)

The Court appoints a judicial district court chief judge as the “director of court administration.” MCR 8.110(B)(1) & (C). As implicitly acknowledged by SCAO, judges and court administrators encounter the risk of litigation with each administrative employment

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<sup>12</sup> The State Court Administrative Office (SCAO) is the administrative agency of the Michigan Supreme Court. Article VI, Section 3 of the Michigan Constitution states that the Michigan Supreme Court “shall appoint an administrator of the courts and other assistants of the supreme court as may be necessary to aid in the administration of the courts of this state.” The Supreme Court has administrative oversight of Michigan's courts and exercises that oversight through the SCAO.

<sup>13</sup> MCL 691.1409 allow governmental agencies to procure insurance:

(1) A governmental agency may purchase liability insurance to indemnify and protect the governmental agency against loss or to protect the governmental agency and an agent, officer, employee, or volunteer of the governmental agency against loss on account of an adverse judgment arising from a claim for personal injury or property damage caused by the governmental agency or its agent, officer, employee, or volunteer. A governmental agency may pay premiums for the insurance authorized by this section out of current funds.

As a practical matter, an insurance policy is the functional equivalent of an indemnification policy because both provide protection from personal exposure for tortious conduct.

decision. SCAO, therefore, recommends that chief judges, on behalf of their courts, protect employees who face potential personal exposure should litigation ensue by adopting an employee indemnification policy (as the 19<sup>th</sup> District Court did for the *Pucci* judgment) or purchasing private liability insurance, as permitted by MCL 691.1408(1) and MCR 691.1409.

Under the express and unambiguous language of MCL 691.1408(1) and MCR 8.110(C), a decision to adopt an indemnification policy on behalf of a district court falls squarely within the administrative powers of a district court chief judge.<sup>14</sup> If not the chief judge, who? (Appx. p. 25a, Exhibit D, Indemnification Policy; Appx. p. 28a, Exhibit E, Wygonik Affidavit, ¶¶ 3-4.) Accordingly, each 19<sup>th</sup> District Court Chief Judge acted within his authority and on behalf of the court when each adopted an employee indemnification policy for the *Pucci* judgment.

**B. A Chief Judge May Adopt a Policy That Indemnifies Employees for Liability Incurred in Their Individual Capacity.**

The stated purpose of the GTLA was to “define and limit” liability of governmental units. *Pavlov v Community Emergency Medical Service, Inc*, 195 Mich App 711, 722 (1992). Under the GTLA, public employees may incur individual liability for tortious conduct. See, e.g., MCL 691.1407(2)(c), & (4). Public employees may also incur personal liability when they violate a citizen’s civil rights guaranteed by state or federal law. See, e.g., MCL 37.2101, et. seq. (Elliott-Larsen Civil Rights Act), MCL 15.361, et. seq. (Whistleblower Protection Act), 42 USC 1981, 42 USC 1983; *Whidbee v Garzarelli Food Specialists, Inc*, 223 F3d 62, 75 (6<sup>th</sup> Cir, 2000)

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<sup>14</sup> In *O’Neill v 19th District Court*, unpublished opinion per curiam of the Court of Appeals, issued January 25, 2002 (Docket No. 223700) (Appx. p. 108a, Exhibit M), another Court of Appeals Panel found that MCL § 600.8221 and MCR 8.110(C)(3)(f), (i) allowed the 19th District Court to disburse \$48,708.12 to indemnify a judge for a portion of his legal fees incurred for alleged misconduct while the judge was a practicing attorney. *Id.* at \*3, citing *Shell, supra* and *Judicial Ass’n v Michigan*, 459 Mich at 299. If a chief judge’s authority extends to the district court’s indemnification and payment of legal fees related to a judge’s misconduct as a private attorney, such authority, *a fortiori*, must extend to assumption of a judge’s personal liability for an improper employment decision made in the course of employment and within the scope of authority as chief judge.

(internal citations omitted) (holding that individuals may be held liable under 42 USC 1981 provided there is affirmative link connecting actor with discriminatory action); *Elezovic v Ford Motor Co.*, 472 Mich 408, 411 (2004) (“We hold that an agent may be individually sued under § 37.2202(1)(a) of the [Civil Rights Act].”) Violation of a citizen’s constitutional rights is a constitutional tort. See e.g., *Monnell*, 436 US 658, 691 (1978).<sup>15</sup>

In *Wilson v Beebe*, 770 F2d 578, 588 (CA 6, 1985), the State of Michigan lawfully exercised its option under MCL 691.1408(1) to indemnify a State Trooper for a personal capacity judgment in a § 1983 action resulting from his violation of a citizen’s constitutional rights. The Court reasoned:

It [the judgment against Beebe in his individual capacity] will be paid by the State because the State has exercised its option under MCLA 691.1408(1) and elected to indemnify Beebe. This obligation is not imposed on the State; it is an obligation voluntarily imposed. There would be no question of who would be liable for a judgment in this case except for the State’s voluntary decision to indemnify Beebe; only Beebe would be liable.

*Id.* MCL 691.1408(1), therefore, allows a governmental agency to indemnify a public employee for payment of a judgment entered against him in his “individual capacity” under § 1983.

The GTLA does not define the term “indemnification.” If “a statute specifically defines a term, that definition alone controls.” *Haynes v Neshewat*, 477 Mich 29, 35 (2007). Undefined terms are given their plain and ordinary meanings. *Id.* at 36. Legal or technical words are presumed to be used according to their peculiar and appropriate meaning. MCL 8.3a. “A dictionary may be consulted if necessary.” *Haynes*, 477 Mich at 36.

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<sup>15</sup> State statutes of limitations apply to determine the timely filing of claims asserted under 42 USC 1983. *McCormick v Miami Univ*, 693 F3d 654, 662 (CA 6, 2012). A three-year statute of limitations for personal injury claims outlined in Mich. Comp. Laws 600.5805(1) governs § 1983 actions where the cause of action arises in Michigan. *Carroll v Wilkerson*, 782 F2d 44, 45 (CA 6, 1986).

Webster's defines "indemnity" as "repayment or reimbursement for loss, damage, etc.; compensation." *Webster's New World Dictionary of the American Language (2d College ed)*, p 714. It defines "repay" as "to pay back (money); refund." *Id.*, p 1204. It defines "reimburse" as "to pay back (money spent)" and "to repay or compensate (a **person**) for expenses, damages, losses, etc." *Id.*, p 1197. As for *Black's Law Dictionary*, it defines "indemnity" as follows:

1. A duty to make good any loss, damage, or liability incurred by another. . . . 2. The right of an injured party to claim reimbursement for its loss, damage, or liability from a **person** who has such a duty. 3. Reimbursement or compensation for loss, damage, or liability in tort; esp., the right of a party who is secondarily liable to recover from the party who is primarily liable for reimbursement of expenditures paid to a third party for injuries resulting from a violation of a common-law duty. [*Black's Law Dictionary* (8th ed), p 837.]

Black's defines "reimbursement" as "[r]epayment" and "[i]ndemnification." *Id.*, p. 1399. As for "third party," Black's defines it as "[a] person who is not a party to a lawsuit, agreement, or other transaction but who is usu. somehow implicated in it; someone other than the principal parties." *Id.*, p. 1617.

The purpose of statutory indemnification is to protect a governmental judgment-debtor's personal assets from execution by a judgment-creditor.<sup>16</sup> See e.g., *Christie v Board of Regents*, 384 Mich 202, 222 (1961); *In Re Amfesco Industries*, 81 BR 777, 785-786 (EDNY, 1988). "A principal purpose of the indemnification statutes is to assure 'the zealous execution of official duties by public employees.'" *Farmers Ins Grp v Cty of Santa Clara*, 11 Cal 4th 992 (1995). Statutory indemnification is superfluous, hollow and meaningless in the absence of personal liability. *In Re Amfesco Industries*, *supra* at 785-786.

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<sup>16</sup> An indemnification obligation to assume payment for a debt is a personal asset of the indemnitee subject to execution by the judgment-debtor. *Royal Oak Township v City of Berkley*, 309 Mich 572, 580 (1944).



MCL 691.1408(1) does not contain the words “individual,” “official,” “capacity,” “federal” or “state.” The statute’s use of the term “judgment” is inclusive, without regard to form. The statute makes no reference to motive or timing for the adoption of an indemnification policy. The statute’s plain, ordinary language evinces the Legislature’s intent to authorize governmental agencies, like the 19th District Court, to indemnify its employees, like Somers, for personal capacity judgments against them for work-related claims.<sup>17</sup> MCL 691.1408 (1); *Wilson v Beebe*, 770 F2d at 588.

Under 42 USC 1983,<sup>18</sup> a person may sue a governmental employee in their “official” and/or “individual” capacity for a constitutional violation.<sup>19</sup> *Hafer v Melo*, 502 US 21, 26 (1991); *Kentucky v Graham*, 473 US 159, 165-166 (1985). Official-capacity suits “generally represent

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<sup>17</sup> “Courts may not speculate regarding legislative intent beyond the words expressed in a statute. Hence, nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself.” *Mich Ed Ass’n v Secretary of State (On Rehearing)*, 489 Mich 194, 217-218 (2011) (quotation omitted).

<sup>18</sup> Section 1983 of Title 28 of the United States Code provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

<sup>19</sup> The labels “official capacity” and “personal capacity” are terms of art, and their definitions cause confusion to both litigants and the courts. *Lawson v Bouck*, 747 F Supp 376, 378-379 (WD Mich, 1990); See also, *Scott v Taylor*, 405 F3d 1251, 1254 (CA 11, 2005); *Suarez v Illinois Valley Community College*, 688 F Supp 376, 379 (ND Ill, 1988); *Fuller v Acklman*, 616 F Supp 2d 1307, fn 3 (ND Ga, 2009). By way of analogy, had Somers run Plaintiff down with his car in a shopping center parking lot he would be acting purely as a private person and not a state actor subject to suit in any capacity pursuant to §1983.



only another way of pleading an action against an entity of which an officer is an agent” and not the named officer. *Id.* at 165-166 (quoting *Monell v New York City Dept of Social Services*, 436 US 658, 690, n. 55); *Lewis v Clarke*, 581 US \_\_\_\_; 197 L Ed 2d 631, 638 (2017); *Will v Mich Dep’t of State Police*, 491 US 58, 78 (1988).<sup>20</sup> A plaintiff cannot collect any money damages from a governmental employee for a § 1983 official-capacity judgment because the state is the real party in interest. *Will v Mich Dep’t of Justice*, 481 US at 71. Thus, “a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself” and not to the assets of the governmental official. *Kentucky v Graham*, at 473 US at 159. Consequently, there is no need to indemnify a public employee for an official capacity judgment because their personal assets are not at stake.

“Individual capacity” suits on the other hand impose personal liability upon a government officer *because* of his official acts. *Hafer v Melo*, 502 US at 26. For § 1983 individual liability to arise, a public employee must *act* in his official capacity (i.e., use his state-conferred office) to cause the constitutional deprivation. *Id.*; *Kentucky v Graham*, 473 US at 166.

As the United States Supreme Court explained:

Summarizing our holding [in *Will*, *supra*], we said: “Neither a State nor its officials acting in their official capacities are ‘persons’ under § 1983.” *Ibid.* Hafer relies on this recapitulation for the proposition that she may not be held personally liable under § 1983 for discharging respondents because she “acted” in her official capacity as auditor general of Pennsylvania. Of course, the claims considered in *Will* were official-capacity claims; **the phrase “acting in their official capacities” is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury.** To the extent that *Will* allows the construction Hafer suggests, however, we now eliminate that ambiguity.

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<sup>20</sup> The *Will* Court explained:

Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official’s office. *Brandon v Holt*, 469 US 464, 471 (1985). As such, it is no different from a suit against the State itself, See e.g., *Kentucky v Graham*, 473 US 159, 165-166 (1985); *Monell*, *supra*, at 690, n. 55.

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Through § 1983, Congress sought “to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position.” *Monroe v Pape*, 365 US 167, 172, 5 L Ed 2d 492, 81 S Ct 473 (1961). Accordingly, it authorized suits to redress deprivations of civil rights by persons acting “under color of any [state] statute, ordinance, regulation, custom, or usage.” 42 USC § 1983. **The requirement of action under color of state law means that Hafer may be liable for discharging respondents precisely because of her authority as auditor general.** We cannot accept the novel proposition that this same official authority insulates Hafer from suit.

*Hafer v Melo*, 502 US at 26, 27-28.

The *Pucci* Panel misapprehended and, therefore, misapplied this critical concept to MCL 691.1408(1). The Panel found that a chief judge, on behalf of a judicial district court, could lawfully agree to indemnify a judge for his “official acts” but, nonetheless, the Panel “did not believe that this power extends to indemnifying judges for liability incurred in their personal liability.” *Id.* at \*18. The Panel failed to acknowledge that, as matter of law, Somers could only incur individual liability for his violation of Pucci’s constitutional rights precisely because of his authorized official actions as 19<sup>th</sup> District Court Chief Judge. *Hafer, supra* at 26-28.

Had the *Pucci* judgment been against Somers only in his “official capacity” he would have no individual liability for its payment and, therefore, no need for indemnification. Clearly, this was not the intention of the Legislature expressed in MCL 691.1408(1). This Court has proclaimed that “We must avoid a statutory construction that would render part of the statute surplusage or nugatory.” *Robinson v Lansing*, 486 Mich 1, 21 (2010). To disallow indemnification, as the Panel did in this case, would render MCL 691.1408(1) nugatory, superfluous and illusory.

The Panel’s erroneous ruling has significant ramifications for all public employees. If the Panel’s ruling stands, governmental agencies could no longer elect to indemnify police officers, firefighters, teachers, doctors, judges, judicial staff and other public employees who incur

personal liability for gross negligence, employment discrimination, medical malpractice, violation of a citizen's constitutional rights or any other claim. Public employees who incur liability in their individual capacity related to the discharge of their official or professional duties would be left bare and fully exposed. Without indemnification, qualified candidates would understandably refuse to accept appointment to administrative positions. Those tasked with decision-making responsibility would refrain from making any employment decisions over which they have authority for fear of risking their personal assets should they be sued.

The 19<sup>th</sup> District Court, through its Chief Judges, elected to indemnify Somers because he incurred individual liability as a result of his authorized official administrative acts as chief judge. Under MCR 8.110(B), (C) and MCL 691.1408(1), each 19<sup>th</sup> District Court Chief Judge was authorized to indemnify Somers for the Pucci judgment. Each lawfully did so.

**C. Chief Judge Somers's Conduct in Terminating Plaintiff Occurred "While in the Course of Employment and While Acting Within the Scope of His . . . Authority."**

MCL 691.1408(1) authorized the 19th District Court to indemnify its employees for personal judgments incurred "...while in the course of employment and while acting within the scope of his or her authority." Somers's termination of Pucci was possible only because he acted while in the course of his employment and exercised his authority as 19<sup>th</sup> District Court Chief Judge. See, *Hafer v Melo*, *supra*. This is a settled question. *Pucci*, 596 Fed App'x 460.

In and of itself, the reorganization of the district court and elimination of Pucci's job was legitimate. It was only Somers's improper motivation which made it unlawful. *Id.* This is undisputed.

MCL 691.1408(1) makes no reference to motivation and this Court refused to insert motive into a statute that made no reference to the term. *Whitman v City of Burton*, 493 Mich

303, 313 (2013).<sup>21</sup> Had the Legislature intended motive or intent to matter it would have said so. It did not. Accordingly, Somers's subjective intent and motive is irrelevant to whether he acted in the course of his employment and within the scope of his authority for purposes of statutory indemnification.

Under Michigan law, the necessary considerations for a course of employment are (1) the existence of an employment relationship, (2) the circumstances of the work environment created by the employment relationship, including the "temporal and spatial boundaries established," and (3) "the notion that the act in question was undertaken in furtherance of the employer's purpose." *Niederhouse v Palmerton*, 300 Mich App 625, 633 (2013), citing *Backus v Kaufman (On Rehearing)*, 238 Mich App 402, 408 (1999), citing, among other authorities, 2 Restatement Agency, 2d, §§ 228(1)(b) and (c), 233-235, pp 504, 516, 518, 520, and Black's Law Dictionary (7th ed), p 356. "An injury arises out of the course of employment when it occurs as a circumstance of or incident to the employment relationship." *Calovecchi v State*, 223 Mich App 349, 352 (1997), *aff'd* 461 Mich 616 (2000). All three criteria are established.

First, it is undisputed that Somers was employed by the State as 19<sup>th</sup> District Court Chief Judge when he terminated Pucci as an employee of the court. Second, it is undisputed that the work environment encompassed Somers's administrative act of reorganizing the court and

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<sup>21</sup> This Court, *supra* at 313, reasoned:

Because there is no statutory basis for imposing a motivation requirement, we will not judicially impose one. To do so would violate the fundamental rule of statutory construction that precludes judicial construction or interpretation where, as here, the statute is clear and unambiguous.

terminating Pucci.<sup>22</sup> As noted above, had Somers not been acting in the course of his employment as Chief Judge he could not have reorganized the court and terminated Pucci.<sup>23</sup>

Third, the reorganization was undertaken in furtherance of the employer's purpose. It is undisputed that Somers implemented the reorganization first proposed by Chief Judge Leo Foran who “assured Somers that the reorganization was in the best interests of the court.”<sup>24</sup> 596 Fed App’x at 464; See also, Appx. p. 460a, Exhibit Z, Plaintiff’s Response to MSJ, Exhibit 9, Foran Reorg. Memo of 3/30/2005 and Appx. p. 463a, Exhibit AA, Plaintiff’s Response to MSJ, Exhibit 21, Somers Reorg. Memo of 10/10/2006.) Somers’s constitutional violation of Pucci’s federal rights “occur[ed] as a circumstance of or incident to the employment relationship.” *Calovecchi v State*, 223 Mich App 349 at 352; *Pucci*, 596 App’x 460. Somers, therefore, was in the course of his employment as 19<sup>th</sup> District Court Chief Judge when he engaged in the conduct which gave rise to the *Pucci* judgment.

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<sup>22</sup> In denying Somers’s motion for summary judgment based on judicial immunity, the District Court found: “Defendant Mark Somers plainly was a judicial officer, but his termination of the plaintiff and elimination of her job were actions taken in an administrative capacity, not a judicial one. *Forrester v White*, 484 US 219, 229-230, 108 S Ct 538, 98 L Ed 2d 555 (1988).” *Pucci v 19<sup>th</sup> District Court*, 834 F Supp 2d at 700.

<sup>23</sup> As the Sixth Circuit Court of Appeals noted:

Pucci first heard of her termination when she found a memo from Somers in her mailbox. Although the memo did not mention Pucci by name, it stated that “[t]he position of [deputy] court administrator will . . . be eliminated effective November 15, 2006.”

*Pucci v. Nineteenth Dist Court*, 596 Fed. Appx. at 464.

<sup>24</sup> As the Sixth Circuit explained:

In other words, the jury had to find that the complaints to the SCAO formed “at least part of the Defendant's reason for taking . . . the adverse action against Pucci.”

*Pucci v Nineteenth Dist Court*, 596 Fed. App’x. at 475.

“Scope of Authority” is defined as “[t]he reasonable power that an agent has been delegated or might foreseeably be delegated in carrying out the principal’s business.” *Backus v Kaufman* (On Rehearing), 238 Mich App 402, 409 (1999), quoting Black’s Law Dictionary (7th Ed), p. 1378. See also, *Petipren v Jaskowski*, 494 Mich 190, 207 (2013) (“Authority” is defined as “a power or right delegated or given,” and “scope” is defined as the “extent or range of view, outlook, application, operation, effectiveness . . . .”) As discussed above, the Michigan Court Rules, Michigan statutes and binding Supreme Court precedent expressly authorized Chief Judge Somers to reorganize the court and terminate Pucci. MCR 8.110(B), (C)(3), MCL 600.8221, MCL 600.8271(b), *Judicial Attorney’s Association*, 459 Mich at 302-303 (1998). *Pucci v Somers*, 834 F Supp 2d 694, 700 (2011) (*Italics added*); See, *Pucci v Nineteenth Dist Court*, 596 Fed App’x at 462. (Appx. p. 10a, Exhibit B). This is beyond challenge.

In *Petipren v Jaskowski*, *supra*, this Court examined the meaning of “scope of ... executive authority” for purposes of governmental immunity under MCL 691.1407(5).<sup>25</sup> In *Petipren*, a citizen sued a police chief for excessive force and related claims in his individual capacity and his official capacity. The police chief invoked absolute immunity under MCL 691.1407(5) which the plaintiff argued was inapplicable because of the officer’s malicious intent.

This Court held that the question of whether an executive acted within the scope of his authority is an “objective inquiry” that “does not include analysis of the actor’s subjective state of mind. *An official’s motive or intent has no bearing on the scope of his or her executive authority.*” *Id.* at 206. (*Emphasis added.*) The Court explained:

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<sup>25</sup> MCL 691.1407 provides, in pertinent part:

(5) A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.

The circuit court's reason for denying summary disposition—that Jaskowski acted with personal animus—is also erroneous. Petipren implicitly resurrects this argument on appeal by offering extensive discussion of the circumstances surrounding his arrest, but as we have made clear, an actor's intent and motivation have no bearing on the scope of his or her executive authority under MCL 691.1407 (5). In sum, because the power to arrest unquestionably falls within the scope of Jaskowski's executive authority under MCL 691.1407(5), as a matter of law, Jaskowski is absolutely immune from tort liability stemming from Petipren's arrest, and the lower courts erred by denying Jaskowski's motions for summary disposition.

*Id.* at 207. See also, *American Transmissions*, 454 Mich 135, 143 (1997) (“The Legislature's grant of immunity in MCL 691.1407(5); MSA 3.996(107) (5) is written with utter clarity. We need not reach the concern that a malevolent-heart exception might not be workable, since the Legislature has provided no such test.”)

Like the police chief in *Petipren*, Chief Judge Somers was unquestionably empowered and authorized as the “director of court administration” to reorganize the district court and terminate Pucci. MCL 600.8271(6)(b); MCR 8.110(B) & (C)(2), (3). Like the police chief in *Petipren*, Somers's motive and subjective intent are not relevant to whether he acted within the scope of his authority (or course of employment). Like the police chief in *Petipren*, Somers violated Pucci's rights while acting within the scope of his authority under the GTLA.

### **CONCLUSION AND RELIEF REQUESTED**

In sum, all three questions posed by the Court must be answered in the affirmative. Plaintiff-Appellant Pucci is entitled to relief.

**ACCORDINGLY**, for all of the reasons contained herein, Plaintiff-Appellant Julie Pucci asks this Court to reverse the opinion of the Court of Appeals and enter judgment in her favor against the Garnishee-Defendant 19<sup>th</sup> District Court and award other relief this Court deems appropriate.

Respectfully submitted,

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